

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

RAD REFERRAL: 09L-22
DATE REFERRED: June 25, 2009
DATE OF NOTIFICATION: August 10, 2009
DATE OF LAST RESPONSE: August 31, 2009
DATE ACTIVATED: July 2, 2009

EXPIRATION OF SOL: October 15, 2013

SOURCE:

RAD Referral

RESPONDENTS:

**MoveOn.org and Wes Boyd, in his official capacity
as treasurer**

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(17)
2 U.S.C. § 434(g)
11 C.F.R. § 104.4(b) and (c)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Reports Analysis Division ("RAD") referred MoveOn.org and Wes Boyd, in his official capacity as treasurer, (the "Committee" or "Respondents") to the Office of General Counsel for failing to file four 48-Hour Notices of independent expenditures totaling \$557,082.36 and for failing to file two 24-Hour Notices of independent expenditures totaling \$158,393.02.

On August 7, 2009, this Office notified the Respondents of the referral in accordance with the Commission's policy regarding notification in non-complaint generated matters. 74 Fed. Reg. 38617 (August 4, 2009). In its response to the notification, received by the

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1 Commission on August 31, 2009, the Committee requests that the Commission take no further
2 action as to the Committee's failure to file the notices in question, or, in the alternative, refer the
3 matter to the Commission's Alternative Dispute Resolution Office. The Committee claims that
4 the reports were timely prepared utilizing the Commission's FECFILE software. However, it
5 claims that three of the 48-Hour Notices in question did not upload to the Commission, and that
6 the fourth 48-Hour Notice uploaded, but for unknown reasons, contained data from a previously
7 filed 48-Hour Notice. The Committee did not specifically address its failure to file the two 24-
8 Hour Notices. The Committee does claim that the failure to properly file the reports was
9 inadvertent, and may have been caused by either human or computer error. Finally, the
10 Committee states that it is taking steps to verify that future notices will be successfully filed with
11 the Commission.

12 As discussed below, it does not appear that the failures to file the notices resulted from
13 problems with the Commission's software, and were instead the result of the Committee's errors.
14 Accordingly, we recommend that the Commission open a matter under review, find reason to
15 believe that the Committee violated 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(b) and (c), and
16 enter into pre-probable cause conciliation with the Committee.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 An independent expenditure is an expenditure that expressly advocates the election or
19 defeat of a clearly identified Federal candidate and that is not made in concert or cooperation
20 with, or at the request or suggestion of, the candidate or his or her committee or agent. 2 U.S.C.
21 § 431(17).

22 A political committee that makes or contracts to make independent expenditures
23 aggregating \$10,000 or more with respect to a given election at any time during a calendar year

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1 up to and including the 20th day before the date of an election shall file a report describing the
2 expenditures within 48 hours. 2 U.S.C. § 434(g)(2); 11 C.F.R. § 104.4(b)(2). The reports,
3 known as 48-Hour Notices, must be filed by the end of the second day "following the date on
4 which a communication that constitutes an independent expenditure is publicly distributed or
5 otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2). The Committee shall file additional
6 reports within 48 hours after each time it makes or contracts to make independent expenditures
7 aggregating an additional \$10,000. *Id.*

8 In addition, a political committee that makes or contracts to make independent
9 expenditures aggregating \$1,000 or more with respect to a given election after the 20th day, but
10 more than 24 hours before the date of an election, shall file a report describing the expenditures
11 within 24 hours. 2 U.S.C. § 434(g)(1); 11 C.F.R. § 104.4(c). The reports, known as 24-Hour
12 Notices, must be filed within 24 hours "following the date on which a communication that
13 constitutes an independent expenditure is publicly distributed or otherwise publicly
14 disseminated." 11 C.F.R. § 104.4(c). The Committee shall file additional reports within 24
15 hours after each time it makes or contracts to make independent expenditures aggregating an
16 additional \$1,000. *Id.*

17 **A. 48-Hour Notices**

18 On October 13, 2008, the Committee filed its 2008 October Quarterly Report, which
19 included a Schedule E disclosing 87 independent expenditures totaling \$4,091,644 that supported
20 or opposed Federal candidates in the 2008 general election. However, the Committee failed to
21 file four 48-Hour Notices for 12 of the independent expenditures totaling \$557,082.36. *See* RAD
22 Referral, Attachment 2.

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1 On November 19, 2008, RAD sent an RFAI to the Committee referencing the 2008
2 October Quarterly Report and the Committee's failure to file the required 48-Hour Notices of
3 independent expenditures. On December 19, 2008, the Committee's assistant treasurer contacted
4 RAD and stated that after he received the RFAI, he reviewed the Committee's data file and
5 realized the notices had been prepared but had not been filed. Referral at 2. He acknowledged
6 that the Committee had not received confirmation receipts for the notices. *Id.* The Committee
7 then filed a Miscellaneous Electronic Submission stating that it had "prepared and closed three
8 reports in its software" and believed that the reports were properly filed utilizing the
9 Commission's FECFILE software. Referral at 3. The Committee provided a copy of its
10 electronic file to demonstrate that the assistant treasurer had prepared the notices. *Id.*

11 In its response to the referral notification, the Committee again maintains that the notices
12 were timely prepared using the Commission's software. In addition, the Committee suggests
13 that it is possible that the notices were not filed because of either human or computer error.
14 Response at 3. The Committee also claims that one of the 48-Hour Notices of independent
15 expenditures totaling \$219,651.76 was prepared and filed, but that for unknown reasons, the
16 report contained data from a 48-Hour Notice originally filed in May 2008. *Id.* The Committee
17 suggests that the Commission's software may have substituted the previously submitted data for
18 the data entered by the Committee. *Id.*

19 B. 24-Hour Notices

20 On December 2, 2008, the Committee filed its 2008 30-day Post-General report which
21 included a Schedule E disclosing 41 independent expenditures totaling \$502,794.34 in support of
22 or opposition to Federal candidates in the 2008 general election. However, the Committee
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1 failed to file two 24-Hour Notices for eight of the 41 independent expenditures totaling
2 \$158,393.02. See RAD Referral, Attachment 3.

3 On February 20, 2009, RAD sent an RFAI to the Committee referencing the 30-Day
4 Post-General report and the Committee's failure to file required 24-Hour Notices of independent
5 expenditures.¹ On February 26, 2009, the Committee filed a Miscellaneous Electronic
6 Submission in response to the RFAI and acknowledged that it had failed to file two 24-Hour
7 Notices for the eight independent expenditures disclosed on the 2008 30-day Post-General
8 report. The Submission stated that the Committee did not realize that the notices had not been
9 filed until it received the RFAI. Again, the Committee provided its data file to demonstrate that
10 one of the notices was prepared for filing, but had not been filed. In its response to the referral
11 notification, the Committee acknowledges that it omitted a disbursement for \$5,000 made to
12 Hotjob.com in one of the prepared 24-Hour Notices. Response at 3, FN 1. However, it did not
13 specifically address its failure to file the 24-Hour Notices. Instead, as previously noted, it
14 generally referenced either human or computer errors related to its failure to file the notices.

15 **C. Analysis**

16 The Committee is responsible for assuring that notices are filed, not merely prepared.
17 See 2 U.S.C. § 434(g)(1), (2) (a committee making an independent expenditure "shall file" a
18 report describing the expenditure) (emphasis added). The Committee violated the Act when it
19 failed to file four 48-Hour Notices of independent expenditures totaling \$557,082.36 and when it
20 failed to file two 24-Hour Notices of independent expenditures totaling \$158,393.02.

¹ The RFAI actually identified nine independent expenditures totaling \$187,915.32 for which 24-Hour Notices had not been filed. The Committee explained to RAD that one of the questioned independent expenditures totaling \$29,522.30 was a residual payment for an estimated expenditure that was previously disclosed. Therefore, RAD did not include that expenditure in the referral.

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1 In its response, the Committee states that the failure to file the notices was inadvertent
2 and that each specific failure may have been the result of either human or computer error.
3 Response at 3. Portions of the response appear to acknowledge that the Committee's assistant
4 treasurer simply made mistakes during the filing process ("failure to properly upload these four
5 reports was inadvertent and possibly caused by technical problems in *using* the Commission's
6 software") (emphasis added), but elsewhere in the response the Respondents appear to allege
7 problems with the FEC intake process (i.e. "the FEC software submitted data from an earlier 48-
8 hour filing from May 2008 rather than the data prepared for the September 10th filing" and
9 "although it appears that the four reports were timely prepared and queued for filing, it appears
10 as though three reports did not successfully upload with your office"). Response at 2-4.

11 If the filing failure resulted from human error by the Committee's staff, this error would
12 not excuse the violation. Further, we do not believe that Commission computer issues prevented
13 the Committee from timely filing the required 48-Hour and 24-Hour Notices, or that an FEC
14 software failure caused the Committee to file a previously-filed notice in error. Instead, for the
15 following reasons, it appears that the assistant treasurer simply failed to file the required notices,
16 and in the case of the previously-filed notices, filed the wrong report in error.

17 First, MoveOn.org is a very experienced political committee with a long history of filing
18 these types of reports. MoveOn.org registered with the Commission in 1999 and has filed
19 disclosure reports with the Commission for almost 11 years. In the Committee's response to the
20 referral notification, the assistant treasurer claims over 20 years experience in filing Commission
21 reports, which would include work on behalf of this Committee and for other political
22 committees. Response at 2. Further, during the election cycle in question, the Committee

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1 successfully filed over fifty 48-Hour and 24-Hour Notices, and for each of the notices, the
2 Committee received a confirmation receipt indicating successful filing.

3 In addition, there is no information suggesting that MoveOn.org experienced filing
4 difficulties that would have prompted the assistant treasurer to contact the Commission seeking
5 assistance to resolve those difficulties. In fact, according to the Commission's Electronic Filing
6 Office, which keeps detailed logs of all requests for technical support, the Committee's assistant
7 treasurer contacts the Commission regularly, and on July 15, 2008, before MoveOn.org's
8 required notices were due, the assistant treasurer contacted the Commission regarding an
9 unrelated report for a different committee because he had not received confirmation that the
10 report had been filed.² However, the Commission received no notice from the Respondents that
11 they were having difficulty filing the notices in question in this matter, or that the Committee had
12 not received confirmations for required notices that it believed had been filed. In addition, the
13 Electronic Filing Office received no reports of difficulty with filing reports or notices from any
14 committee at the time that the Respondents were required to file the notices.

15 With regard to the 48-Hour Notice that Respondents claim was filed with incorrect
16 information, the Electronic Filing Office indicates that the software would not have substituted
17 incorrect or outdated information into the form. Each time a political committee determines that
18 it is appropriate to file a notice or report, the filer accesses a form on the FECFILE software.
19 That form is empty until the filer inputs the information. The filer prepares the required notice or
20 report and saves it to the committee's database. When it is time to electronically file, the filer

² The assistant treasurer for this Committee files reports for more than one political committee, and his request for technical support was related to a report for a different committee. Nonetheless, his call to the Electronic Filing Office indicates that the assistant treasurer is aware that if issues arise, the Commission is available to provide technical support. In that unrelated matter, the report failed to upload due to operator error, not from any failure of the Commission's software.

1 accesses the report or notice and uploads it to the Commission. Given these facts, it is likely that
2 the assistant treasurer in this matter accessed and uploaded the wrong report.

3 Finally, during conversations with RAD in response to the RFAs, the Committee
4 acknowledged that although it had prepared the notices, they were not filed with the
5 Commission. Referral at 2. None of the submissions made in response to the RFAs alleges an
6 agency computer error. While the Committee's response to the referral notification questions
7 whether the failure was due to human or possibly computer error, it is reasonable to expect that
8 the Respondents would have explicitly raised any such issues at the time they were first advised
9 of the missing reports. Response at 3. Because the Committee failed to file the notices with the
10 Commission, we recommend that the Commission find reason to believe that MoveOn.org and
11 Wes Boyd, in his official capacity as treasurer, violated 2 U.S.C. § 434(g) and 11 C.F.R.
12 § 104.4(b) and (c).

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IV. RECOMMENDATIONS

1. Open a matter under review;
2. Find reason to believe that MoveOn.org and Wes Boyd, in his official capacity as treasurer, violated 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(b) and (c);
- 3.
4. Approve the attached Factual and Legal Analysis; and
5. Approve the appropriate letter.

Feb. 18, 2010

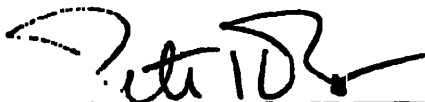
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Thomasenia P. Duncan
General Counsel




Stephen Gura
Deputy Associate General Counsel
for Enforcement



Peter G. Blumberg
Assistant General Counsel

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Wanda D. Brown
Attorney

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